

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1594

United States Court of Appeals
FOR THE SECOND CIRCUIT

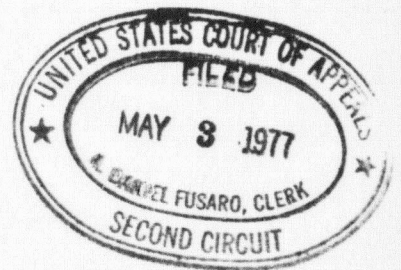
UNITED STATES OF AMERICA,
Appellee,
against
JOHN DEGRAFFENRIED,
Appellant.

On Appeal from the United States District Court for the
Southern District of New York (MacMahon, J.)

REPLY BRIEF FOR APPELLANT
JOHN DEGRAFFENREID

BARRY H. GARFINKEL
Attorney For Appellant
John Degraffenried
Office and P.O. Address:
919 Third Avenue
New York, New York
10022
Tel. (212) 371-6000

THOMAS G. ROTH
Of Counsel



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1594

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN DEGRAFFENREID,

Appellant.

REPLY BRIEF FOR APPELLANT
JOHN DEGRAFFENREID

Perhaps the most convincing way to demonstrate to this Court the full tenor of the unfortunate prejudicial comments of the trial judge on the "unbelievable" issue is to set forth in full the relevant parts of the record.*

* We have underscored, for emphasis, certain portions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: The jury can take a 30-second recess.

(Jury left the courtroom.)

THE COURT: Mr. Thau, you reserved at the close of the Government's case and now make both of your motions.

MR. THAU: I wanted to make another motion just now. This time, your Honor, I move for a mistrial on the ground that some time earlier this morning, at a bench conference, your Honor called me a liar. Now, it is subjective whether the jury heard it or not. Mr. Schatz

1 jks

2 gave his opinion that they didn't. I don't assert that
3 they definitely did. All I can say is that in my
4 judgment, perhaps because of the importance of the words,
5 I felt that perhaps they did. There is a possibility
6 of it.

7 But in addition thereto, your Honor, as the
8 defendant was getting off the stand and Juror No. 7 was
9 passing you by, right after you called this very short
10 recess we are on now, your Honor said to the Court Reporter,
11 who was then standing at the bench, "Unbelievable.
12 Unbelievable."

13 Now, I am sitting some 30 feet away from your
14 Honor. I am not eavesdropping on the Court's conversa-
15 tions, but I assert to you, and I would take an oath to it,
16 that I heard it.

17 THE COURT: You heard me say "unbelievable"
18 or "incredible"?

19 MR. THAU: Yes.

20 THE COURT: You sure did, but it wasn't with
21 reference to you.

22 MR. THAU: Perhaps not. I am not saying
23 that it definitely was, but the point is that the defendant
24 had just gotten off the stand and Juror No. 7 was perhaps
25 within five feet or seven feet, let's say, of your Honor

as she was getting out of the jury box.

THE COURT: Mr. Thau, I am going to grant your motion for a mistrial and with the request that you never appear before me again. I think you are an accomplished incompetent as well as being a wise guy and outright liar.

We will impanel a jury next week in this case.

MR. THAU: Your Honor, I am due to be before Judge Metzner on Monday and, of course, I would need the minutes of these proceedings.

THE COURT: This case is a mistrial. You are going to be removed from it when Mr. Mogel gets here at five minutes of one and proceed with some other lawyer. I can save the Legal Aid Society and yourself and me a lot of embarrassment if in the future when a case is assigned to me you bow out.

MR. THAU: Would your Honor elaborate on why I am a liard? In my 12 years at the bar --

THE COURT: Because you outright misrepresented. I was speaking in a whisper here. I was just admonishing you for your constant disregard of my directions to you, to stop making remarks.

MR. THAU: I don't know if the jury heard. I didn't say they heard.

1 jks

2 THE COURT: You don't know it, but you asserted
3 it up here on the record.

4 MR. THAU: I was in fear --

5 THE COURT: You asserted it on the record.
6 You are talking to the Court of Appeals, trying to make a
7 point like any punk, not as a lawyer who represents Legal
8 Aid, and not like the kind of lawyer I like to see assigned
9 to defend somebody in my cases. That is why.

10 MR. SCHATZ: Your Honor, could I make a
11 suggestion?

12 THE COURT: I did not speak loud. I spoke
13 softly.

14 MR. THAU: I am not saying you screamed by any
15 means.

16 THE COURT: I didn't scream, nor did I speak
17 loud, and you forced me to do it by repeatedly ignoring
18 my directions.

19 MR. THAU: Perhaps the import of the words
20 themselves were such that they sounded louder to me than --

21 THE COURT: I don't need this kind of thing,
22 not for these prices. I don't need it. I don't have
23 to put up with guys like you.

24 MR. THAU: I withdraw my application for a
25 mistrial and I apologize to the Court.

jks

THE COURT: I granted it. I don't want anything to do with you. I grant the mistrial. We will set another date as soon as we get new counsel.

A SHORT COMMENTARY

The "Unbelievable" Issue:

The record fairly shows that:

1. The trial judge admittedly made his prejudicial "unbelievable" comments while the jury was still in the box and immediately after the defendant testified.

2. The trial judge admitted that his statement was not with reference to defense counsel.

3. Defense counsel heard the judge's comment from a distance of 30 feet away from the bench.

4. The trial judge's statement that he "spoke softly" (App. 18, Tr. 230) was directed to his side-bar blast that defense counsel was a "liar." (See App. 14, Tr. 180.)

The Claimed Curing Voir Dire:

Contrary to the Government's argument, the record shows that the trial court's interrogation of the jury was directed to whether the jurors heard the various inflammatory remarks by the court to defense counsel "when I have had counsel up here" (App. 22, Tr. 234). Indeed, the court plainly stated: "I will voir dire them [the jury] whether they heard

anything at the bench" (App. 22, Tr. 234, emphasis added).^{*} It is straining the printed words of the record to urge, as the Government does, that his voir dire embraced the dramatic "unbelievable" statement -- which was not side-bar.

CONCLUSION

The judgment of conviction should be reversed.

Dated: New York, New York
May 3, 1977

Respectfully submitted,

BARRY H. GARFINKEL
Attorney for Appellant
John Degraffenreid
Office and P.O. Address:
919 Third Avenue
New York, New York 10022
Tel.: (212) 371-6000

Thomas G. Roth
Of Counsel

^{*} The Government itself only sought a voir dire covering "comments of counsel or the bench during any of the bench conferences." (App. 21, Tr. 233).

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775

② COPY RECEIVED
ROBERT B. FISKE JR.
MAY 3 1977
U.S. ATTORNEY
SOL. DEPT. OF JUSTICE